# No. 10,355

IN THE

# United States Circuit Court of Appeals

**For the Ninth Circuit**

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LIBERTY MUTUAL INSURANCE COMPANY (a Massachusetts corporation),

*Appellant,*

vs.

JOHN C. GRAY, Deputy Commissioner of the United States Employees' Compensation Commission for the Pacific Compensation District, and LELAND T. McCLEES,

*Appellees.*

**Upon Appeal from the District Court of the United States for the Territory of Hawaii.**

## APPELLANT'S OPENING BRIEF.

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### STATEMENT AS TO JURISDICTION.

This is an appeal in an injunction proceeding brought by Liberty Mutual Insurance Company against Andrew R. Schmitz, Deputy Commissioner of the United States Employees' Compensation Commission for the Pacific Compensation District, and Leland T. McClees, Claimant, under the provisions of the Longshoremen's and Harbor Workers' Act of March 4,

1927 (33 U. S. C. A. 921) made applicable to certain defense base workers outside the continental limits of the United States by the Defense Bases Act, approved August 16, 1941. (42 U. S. C. A. 1651-1654.) This latter act, "Public Law 208—77th Congress—Chapter 357, 1st Session," is printed in the appendix hereto.

The complaint was filed in the District Court of the United States for the Territory of Hawaii on August 5, 1942. (R. 12.) Subsequent to the filing of the complaint Deputy Commissioner Andrew R. Schmitz was succeeded by John C. Gray. Thereafter and on October 31, 1942, it was stipulated by and between the respective parties hereto that the said John C. Gray "may be substituted as a party defendant for the said Andrew R. Schmitz." (R. 22.) The action therefore comes to this Court on appeal with John C. Gray, as said Deputy Commissioner, named as one of the appellees instead of Andrew R. Schmitz.

In paragraph I of the complaint (R. 6) the following allegation is made:

> "That this Court has jurisdiction of this cause of action by reason of the Act of Congress of the United States approved August 16, 1941, 55 Stat. 623 (42 U. S. C. A., Secs. 1651-1654) (Defense-Bases Act), and particularly by reason of Section 1653 (b), reading as follows:
>
> 'Judicial proceedings provided under Sections 918 and 921 of Title 33 in respect to a compensation order made pursuant to Sections 1651-1654 of this title shall be instituted in the United States District Court of the judicial district wherein is located the office of the deputy commissioner whose

compensation order is involved if his office is located in a judicial district, and if not so located, such judicial proceedings shall be instituted in the judicial district nearest the base at which the injury or death occurs' ";

"That in accordance with the aforesaid subsection (b) this complaint is brought pursuant to the procedure set forth in the Longshoremen's and Harbor Workers' Act of March 4, 1927, as amended (49 Stat. 921, 33 U. S. C. A., Sec. 921.)"

The complaint also alleges that the plaintiff at all times mentioned therein was a Massachusetts corporation, duly licensed to do an insurance business in Hawaii (R. 7); sets forth the legal status and identity of the other plaintiffs; alleges that Andrew R. Schmitz is the Deputy Commissioner for the Pacific Compensation District; that the said Leland T. McClees is a claimant under said Defense Bases Act (R. 8), and that the plaintiff Liberty Mutual Insurance Company, at all times in the complaint mentioned was the compensation carrier for the other plaintiffs named therein. (R. 8.)

The Rules of Civil Procedure, Sec. 81 (a) 6, as amended by order of the Supreme Court made on December 28, 1939, to become effective on September 1, 1940, read as follows:

"(6) These rules do not apply to proceedings under the Act of September 13, 1888, C. 1015, Sec. 13 (25 Stat. 479) as amended, U. S. C., Title 8, Sec. 282, relating to deportation of Chinese; they apply to proceedings for enforcement or review of compensation orders under the Longshoremen's

and Harbor Workers' Compensation Act of March 4, 1927, C. 509, Secs. 18, 21 (44 Stat. 1434, 1436), U. S. C. Title 33, Sec. 918, 921, except to the extent that matters of procedure are provided for in that Act."

The Court has jurisdiction of this appeal under Par. (a), Sec. 225, Title 28, U. S. C. A., and by virtue of the notice of appeal and bond filed January 2, 1943. (R. 97-98.)

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**SUMMARY OF PLEADINGS.**

The first four paragraphs of the complaint have been summarized under the heading "Statement as to Jurisdiction". Beginning with paragraph V (R. 8) the complaint alleges that in February, 1942, the Contractors (Contractors, Pacific Naval Air Bases) employed claimant Leland T. McClees as a truck driver at Kaneohe, which employment continued from February 26, 1942, until April 15, 1942; that as a part of said claimant's contract of employment he was, from and after April 10, 1942, furnished board and lodging at the Bird Farm Camp at Kaneohe maintained for that purpose by the Contractors; that claimant last worked for the Contractors on April 14, 1942. (R. 8.)

That on April 15, 1942, claimant, for purposes of his own, asked for and received a one-day leave from his job and traveled as a "hitch-hiker" by automobile to Honolulu, that on April 16, 1942, claimant was supposed to report back to work at Kaneohe but that

he failed to do so, remaining in Honolulu for purposes of his own; that on April 17, 1942, claimant sustained certain injuries while riding on a Honolulu Construction & Draying Company, Limited laborer truck en route to Kaneohe; that said injury was sustained when said Honolulu Construction & Draying Company, Limited truck collided with another vehicle going in an opposite direction on Nuuanu Avenue in said Honolulu, at a point approximately twelve miles from his place of employment. (R. 9.)

Paragraph VII of the complaint (R. 9) alleges that thereafter on June 8, 1942, said claimant filed a claim with the Deputy Commissioner (then Andrew R. Schmitz) against the Contractors for compensation in connection with alleged physical disability, which disability said Leland T. McClees claimed resulted from an injury arising out of and in the course of his employment with said Contractors; that thereafter on June 11, 1942, a hearing was held in the offices of the Deputy Commissioner on said claim, which claim was opposed by said Contractors and their insurance carrier, Liberty Mutual Insurance Company. (The transcript of this hearing, which was incorporated in the complaint by reference, was subsequently introduced in evidence as Plaintiff's Exhibit No. 1. (R. 95.) It is printed in full in the record herein, pages 51 to 78.)

Paragraphs VIII and IX of the complaint printed verbatim are as follows:

"VIII.

That the evidence at said hearing conclusively proved that at the time of said injuries said Leland

T. McClees was not in the employ of the Contractors, was not at his place of employment, was on a personal venture having no connection with his employment, and was not acting in the course of his employment; that at said hearing said Leland T. McClees claimed to have been traveling on said Honolulu Construction & Draying Company, Limited truck in order to return to his place of employment; that the evidence at said hearing showed that claimant was not authorized to return to his place of employment by means of said Honolulu Construction & Draying Company, Limited truck and that said transportation was not a part of his contract of hire, and that said Honolulu Construction & Draying Company, Limited truck was not furnished by the Contractors for the purpose of bringing said Leland T. McClees back to Kaneohe; that after said hearing said defendant Andrew R. Schmitz made and entered an award of compensation to said claimant Leland T. McClees, a copy of which award is hereto attached, marked Exhibit 'A' and incorporated in this Complaint by reference. [For 'Award of Compensation' see Transcript of Record herein, pages 14-17.]

## IX.

That said award of compensation was and is improper, erroneous and invalid and not in accordance with law in the following respects:

1. The defendant Andrew R. Schmitz as Deputy Commissioner aforesaid acted arbitrarily and in excess of his powers and jurisdiction;

2. The findings of fact made by defendant were not based upon substantial, competent evidence as required by law;

3. The claimant was not an employee of the Contractors when he sustained the injury for which compensation is sought;

4. There was no substantial, competent evidence that the injury sustained by the claimant arose out of his employment;

5. There was no substantial, competent evidence that the injury sustained by claimant arose in the course of his employment;

6. The finding in said award that 'such transportation to work from Honolulu was available for employees other than those who lived at the Contractors' Hotel if they wished to use it' and that claimant 'was using a conveyance provided by the employer for such purposes' is unsupported by any evidence introduced at said hearing before said Deputy Commissioner;

7. That all of the evidence and the only evidence before the said Deputy Commissioner showed that the accident occurred off the employer's premises; that the claimant at the time he sustained said injuries was on a personal venture of his own, having no connection with his employment; that he was riding in a conveyance and at a place selected by him, not by the employer, exposing him to hazards not incident to his employment, and that the accident was not the result

of any industrial risk, but arose from a common peril to which the public generally was exposed.

Wherefore, plaintiffs pray that defendants be summoned to answer this complaint if answer they have and that an injunction issue restraining and enjoining said defendants from enforcing said award of compensation and that an order be entered setting aside said award of compensation to said Leland T. McClees and that plaintiffs have their costs herein incurred and such other and further relief in the premises as the Court may deem equitable and just." (R. 10-11.)

The answer of the Deputy Commissioner denies and puts in issue all controversial allegations of the complaint, and, by way of further answer, alleges that the award was fully in accordance with law, that the transcript of testimony and exhibits before the Deputy Commissioner amply justify his findings and the award based thereon; that, therefore, the Court has no other alternative than to sustain the Award of Compensation; wherefore defendant demands dismissal of the Complaint with costs.

At the final hearing in the District Court it was agreed between the Court and plaintiff's counsel (defendant's counsel not dissenting), that the only question before the Court for decision was "whether the Commissioner was correct and had sufficient facts for his findings and conclusions of law that the injury resulted from and during the course of the man's employment."

**STATEMENT OF THE CASE.**

At the hearing before the Deputy Commissioner claimant was the only witness. The more material parts of his testimony were in substance as follows:

Leland T. McClees, the claimant, began work as a dump truck driver for Contractors Pacific Naval Air Bases at Kaneohe base, near Honolulu, about January 20, 1942. (R. 58-59.) At first he lived at the Contractors Hotel on North King Street, Honolulu, but about six days before the accident in question, which occurred on April 17, 1942, the claimant went to live at Bird Farm Camp, about a mile from his place of employment. (R. 60.)

When he lived at the Contractors Hotel in Honolulu claimant was taken to and from his job at Kaneohe base by trucks of the Honolulu Construction and Draying Company. After he went to Bird Farm Camp to live his employers furnished transportation from the camp to claimant's job. (R. 60.)

Claimant worked seven days a week except as an occasional day off might be granted by his foreman on request. Such a request was made by claimant and the foreman gave him permission to be absent for one day. (R. 69.) On April 15th claimant went into Honolulu, overstayed his leave one day and was injured when returning to Kaneohe base on the morning of April 17th in a truck of the Honolulu Construction and Draying Company which was sideswiped by a dairy truck. (R. 52.)

**Purpose of claimant in visiting Honolulu.**

Questioned by the Deputy Commissioner, claimant testified (R. 64) that he arrived in Honolulu about noon, attempted to arrange a dental appointment but found the dentist busy; claimant met his brother, who is in the Navy, was with his brother during the afternoon and spent the night at the house of a friend, also employed by the Contractors at Kaneohe (R. 65); that his trip to Honolulu was entirely on personal business.

Questioned by C. F. White, representing the employer and compensation carrier (R. 67), claimant said that he came alone to Honolulu; that he spent the time from noon to later afternoon with his brother and then went to the house of a friend, unaccompanied by his brother; admitted that he came to Honolulu on purely personal business; that he was returning to his job at the time of the accident; that if it had not been for his personal trip to Honolulu he would have stayed at Bird Farm Camp that night (R. 68) and would have been given transportation from Bird Farm to his job; that he came into Honolulu to get clothes and laundry; that he came over on the 15th, stayed two days and spent the night of the 15th and 16th at his friend's house.

**Status of truck in which claimant was riding when injured.**

Testimony as to the ownership and management of the truck in which claimant was injured developed nothing to indicate that it belonged to his employer or was operated by claimant's fellow servants. The truck

belonged to the Honolulu Construction and Draying Company.

When he lived at the Contractors Hotel in Honolulu previous to going to Bird Farm Camp, claimant had ridden in the same truck in which he was riding when injured; two such trucks called at the Contractors Hotel every morning to take employees living there to the Kaneohe base; it did not appear that these trucks ever carried employees from Honolulu to Bird Farm Camp, or were used for any other purpose than for taking Kaneohe base employees from the Contractors Hotel to their place of employment. Nor does it appear that claimant had any authorization from any one to use this method of transportation back to his job. From past experience he knew where he could board the truck and did so upon his own initiative. (R. 65.) He was acquainted with the driver and paid him no fare.

Claimant came to town on a Naval Contractors' truck, having a sign on it "Navy Yard 50 and 41-73". He stated that there was no rule compelling men visiting in town to go home by company truck; that, to the contrary, men living at Kaneohe who visited Honolulu were obliged to provide their own transportation back; there is bus and taxicab service between Honolulu and Kaneohe. (R. 72.) Also, claimant said employees who came into Honolulu for a day off could ride back on a company truck—if they could find one; that he had heard of no rule to the contrary. However, there was no testimony tending to show that the employer knowingly permitted such practice or was aware of it,

much less that it was accorded employees as a privilege. (R. 73-74.)

**Note as to typographical error.**

(Note: In the Transcript of Record herein, page 30, next to last line from bottom of page, in the excerpt from the opinion in *Cudahy Co. v. Parramore,* 263 U. S. 418, 44 S. Ct. 153, 68 L. Ed. 366, the word printed *casual* should read *causal.*)

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**SPECIFICATION OF ERRORS.**

1. The Court erred in finding that claimant's injuries arose from his employment inasmuch as claimant, when injured, was engaged in matters personal to himself and in no sense a part of any duty required by his employer.

2. The Court erred in finding that claimant's injuries were incurred while acting within the scope of his employment inasmuch as claimant was off duty when injured, was not on his employer's premises and was not acting or supposed to be acting under the orders of his employer.

3. The Court erred in refusing to annul the order and award inasmuch as they are not supported by the evidence and are therefore in excess of the jurisdiction of the Court.

4. The Court erred in refusing to grant plaintiff a mandatory injunction restraining defendants from enforcing said award of compensation.

5. The Court erred in refusing to annul the award and grant plaintiff a mandatory injunction on the ground that claimant's injuries were not industrial in character but resulted from a risk to which all users of the highways are exposed.

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**SUMMARY OF ARGUMENT.**

Appellant's argument is divided into three sections:

I. *Principles of law governing this action.* In this section is set forth the basic law defining "injury" as the word is used in the Longshoremen's and Harbor Workers' Compensation Act, and (a) the "Going and Coming Rule," as defined by the Supreme Court of the United States, followed by citations illustrating exceptions to the general rule.

II. *A review of Federal Court cases in point herein.* Cases cited in this section construe the terms "arising out of the employment" and "in the course of the employment" as used in the Act rather than discuss specific instances of employees injured while going to or coming from work.

III. *A list of cases directly in point.* This section is a review of specific cases from many jurisdictions involving employees injured when going to or coming from work under circumstances analogous to those of the case at bar.

## ARGUMENT.

## I.

### PRINCIPLES OF LAW GOVERNING THIS ACTION.

In the opinion of the District Court (R. 33) these words appear:

> "In late years courts have found little difference between acts which read 'out of and in the course of employment' and those reading 'out of or in the course of employment'. They mean the same thing."

Whether the foregoing statement be true or not as an abstract proposition, it assuredly has no application to the case at bar. The rights, duties and liabilities herein arise from and are governed by the Longshoremen's and Harbor Workers' Act, of which Section 2 (2) (33 U. S. C. A. 902, Subd. 2) reads as follows:

> "(2) The term 'injury' means accidental injury or death arising out of *and* in the course of employment, and such occupational disease," etc.

In the instant case the claimant's injuries could not have arisen in the course of his employment for he had been absent from his job for two days when injured. Neither could they have arisen out of it, for, when off duty, on business or pleasure for himself and off his employers' premises he was injured by an instrumentality neither belonging to nor controlled by the employer, namely, a truck of the Honolulu Construction and Draying Company, a conveyance selected by claimant himself upon his own authority and initiative.

**a. The going and coming rule and exceptions thereto.**

This is a case involving what is known in compensation law as the "Going and Coming Rule." In a case arising under the Longshoremen's Act the Supreme Court of the United States has stated this rule in these words:

> "The general rule is that the injuries sustained by employees when going to or returning from their regular place of work are not deemed to arise out of and in the course of their employment. Ordinarily the hazards they encounter in such journeys are not incident to the employer's business. But this general rule is subject to exceptions which depend upon the nature and circumstances of the particular employment."
>
> *Voehl v. Indemnity Ins. Co.,* 288 U.S. 162, 77 L. Ed. 676.

As to the character of exceptions to the rule, the *Voehl* case itself is a marked example. Voehl, the claimant, was an employee of a refrigerating plant in the City of Washington, having charge of maintenance and operation of the company's warehouse. While his regular hours were from 7:30 A.M. to 5:30 P.M. six days a week, he was in a sense on duty all the time, being subject to call upon the happening of an emergency. It was a part of his contract that at such times he should be paid a specified hourly wage from the time he left his home till he returned thereto, also he received five cents a mile for use of his automobile.

Summoned to work on a Sunday, Voehl was injured in an automobile accident. The Supreme Court held

this to be an exception to the Going and Coming Rule and reversed the lower court which had held the accident not compensable.

Another and common type of exception to the Going and Coming Rule is found in *Lamm v. Silver Falls Timber Co.*, 133 Or. 468, 286 Pac. 527. In this case the claimant, a logger, was injured while returning from town to the logging camp on his employer's logging train. It was the custom of the camp and one of the privileges accorded employees as a condition of their employment that they might ride back and forth at will on the train. The award in claimant's favor was affirmed.

Employees carried to their jobs by their employer's trucks or other vehicles as a condition of the employment constitute another exception of this type.

There are, of course, other types of exception to the Going and Coming Rule—such, for example, as that arising from the existence of a special hazard, as a railroad track, to which the employee must expose himself as he approaches or leaves his employer's premises—but they are not relevant to the case at bar.

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## II.

**DECISIONS OF THE FEDERAL COURTS CONSTRUING PROVISIONS OF THE LONGSHOREMEN'S AND HARBOR WORKERS' ACT INVOLVED HEREIN CONSTITUTE AMPLE AUTHORITY FOR REVERSAL OF THE JUDGMENT OF THE DISTRICT COURT.**

Before discussing analogous cases which have arisen throughout American jurisdictions generally it is ap-

propriate to call attention to the decisions of Federal Courts construing provisions of the Longshoremen's and Harbor Workers' Act involved herein.

As stated on a preceding page, Section 2 of the Act, 33 U. S. C. A. 902 (2), reads as follows:

> "The term 'injury' means accidental injury or death arising out of *and* in the course of employment". (Italics ours.)

As said in *McWilliams Dredg. Co. v. Henderson,* 36 Fed. Sup. 361, and *West Penn. Sand & Coal Co. v. Norton,* 95 Fed. (2d) 498, both construing this Act: "To be compensable death must both arise out of and in the course of employment," and the phrase "arise out of employment" requires a causal connection between the conditions of work and the accident. It is necessary in order to make an award that the risk causing the injury or death be one incident to the employment.

*Fazio v. Cardillo,* 109 F. (2d) 835;
*Speaks v. Hoage,* 78 F. (2d) 208; cert. den. 296 U. S. 574, 80 L. Ed. 405;
*Ayers v. Hoage,* 63 F. (2d) 364;
*Southern Shipping Co. v. Lawson,* 5 Fed. Sup. 321.

The Longshoremen's and Harbor Workers' Act was patterned after the New York Act and it has been held that, in construing the Longshoremen's Act, decisions of the New York Courts construing the New York Act may be consulted. (*Employers' Liability Assur. Corporation v. Monahan,* 91 F. (2d) 130.)

In *Lepow v. L. K. M.,* 32 N. Y. S. (2d) 498 (1942), the Court said:

"The Workmen's Compensation Law is not applicable to an injury which arose through a danger or hazard disassociated from and not inherent in the nature of the employment as its source and to which the employee would have been equally exposed apart from the employment. This conclusion is not affected by the fact that the employee would not, except for the employment, have been where such danger or hazard existed. * * * It must be one of the risks connected with the employment flowing therefrom as a natural consequence and directly connected with the work."

In *Mich. Transit Corp. v. Brown,* 56 Fed. (2d) 200, 202, the Court in a single paragraph summarizes many decisions construing the phrases "in the course of" and "arising out of":

"It is sufficient to say that an injury is received 'in the course of' the employment when it comes while the workman is doing the duty which he is employed to perform. It arises 'out of' the employment, when there is apparent to the rational mind upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Under this test, if the injury can be seen to have followed as a natural incident of the work and to have been contemplated by a reasonable person familiar with the whole situation as a result of the exposure occasioned by the nature of the employment, then it arises 'out of' the employment. But it excludes an injury which cannot fairly be traced to the employment as a contributing proximate cause and which comes from a hazard to which the workmen would have been equally exposed apart from the employment. The causative danger must be peculiar to

the work, and not common to the neighborhood. It must be incidental to the character of the business and not independent of the relation of master and servant. It need not have been foreseen or expected, but after the event it must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence."

*Mich. Transit Corp. v. Brown,* 56 Fed. (2d) 200, 202, supra.

And in another Federal Court case it was said on the same subject:

"An injury 'arises out of' the employment within the meaning of the Compensation Act when it occurs in the course of the employment and as the result of a risk involved in or incidental to the employment or to the conditions under which it is required to be performed. The mere fact that the injury is contemporaneous or coincident with the employment is not a sufficient basis for an award. Indemnity Insurance Co. of North America v. Hoage, 61 App. D. C. 173, 58 F. (2d) 1074, 60 Wash. Law Rep. 450; Madore v. New Departure Mfg. Co., 104 Conn. 709, 134 A. 259, 261. In the Madore Case the court said: 'Before he can make a valid award, the trier must determine that there is a direct causal connection between the injury whether it be the result of accident or disease, and the employment. The question he must answer is: Was the employment a proximate cause of the disablement, or was the injured condition merely contemporaneous or coincident with the employment? If it was the latter, there can be no award made.' "

*Ayers v. Hoage,* 63 F. (2d) 364, 365, supra.

## III.

**A LIST OF TYPICAL AMERICAN COMPENSATION CASES ARISING IN MANY STATES SUPPORTS WITH PRACTICAL UNANIMITY APPELLANT'S CONTENTION THAT THE JUDGMENT HEREIN SHOULD BE REVERSED.**

Among the state cases applicable herein is *Bozant v. Federal Underwriters' Exchange,* 159 S. W. (2d) 973 (Tex.). In that case the repair shop employee, after completing his day's work and starting to the bus line, decided to ride to the street on which his home was located, on one of the employer's trucks, at the suggestion of the repair shop superintendent and was injured in a collision. The Court stated the general rule that injuries received while riding to and from work are not compensable and held that in order for injuries resulting from risks of streets and highways, to be compensable, the employee at the time of the injury must be actually engaged in the performance of some particular duty of his employment, or must be on some substantial mission of his employer's in the course of employment which subjects him to such peril. The Court said:

> "This rule is based on the premise that one injured upon the streets or highways while going to or from his work, suffers his injury as a consequence of risks and hazards of the streets and highways to which all members of the public are alike subject and not as a consequence of risks and hazards having to do with and originating in the work or business of the employer."

The Court cites to the same effect the case of *Travelers' Ins. Co. v. Santos,* 55 S. W. (2d) 868 (Texas), where the claimant had obtained permission

from the foreman of the company to ride to Eagle Pass, Texas, in a truck belonging to the employer. He was denied compensation for injuries sustained while returning to work on the truck.

In *Fowler v. Louisiana Highway Comm.,* 160 So. 813 (La.), the employer, as an accommodation to its employees, allowed them to ride into town from their place of employment on a company truck and to return on the truck when the weekend was over. The men were employed in road work some thirty to forty miles away from the home of the deceased employee. Some employees used their own cars to get to and from the place of employment. There was no express understanding that the employees without transportation would be furnished the same. The use of the truck over weekends grew into a regular practice known to all. It was a personal matter to the employees whether to go into town over the weekend. The deceased rode in from the labor camp on Saturday and in trying to jump on the moving vehicle, on Monday morning on its return trip, was run over. The Court held:

> "It would require a stretching of the law beyond 'the limit' to hold, in view of these and other established facts in the case, that deceased's employment began when he reached the roadside to board defendant's truck en route to Tensas Parish."

To the same effect is *Goldsworthy v. Schreiber,* 250 N. W. 427 (Wis.), another case where the facts were

even more favorable to the claimant than in the instant case. In that case the employer had given his employees to understand that on weekends they could ride into town from the camp where they stayed, on a company truck free of charge, returning on Sunday evening with the truck. They were not required to go into town but could stay at the camp over the weekend if they wished, although they had to cook their own food in such case. There was bus transportation available and some men used their own cars, receiving no extra pay for doing so. Deceased was paid by the day. The evidence showed that the employer had been asked about transportation by some of the employees and told them they could ride on the truck if they desired. The Court said that the question was whether such transportation was furnished pursuant to contractual obligation or as a mere accommodation to the employees and as an inducement to them to enter the employment, and held that it was the latter. The Court, in denying compensation, emphasized that the men were at liberty to remain in the camp and were not furthering the interests of the employer in going into town for their own personal ends.

Among other cases in point herein are:

*American Mutual Liability Ins. Co. v. Curry* (Ga.), 200 S. E. 150 (replete with citations);

*Schultz v. Beaver Products,* 229 N. Y. S., affirmed 166 N. E. 326 (employees permitted to ride into town on company truck; employee held not in course of employment when killed);

*Walker v. Hyde* (Idaho), 253 Pac. 1104 (employee killed while trying to jump on truck to return to his job during noon hour; *Held,* not in course of employment);

*Denver & Rio Grande W. R. Co. v. Ind. Comm.* (Utah), 269 Pac. 512; (employee used employer's truck to get to section house, for the purpose of being taken from there to job; was riding on employer's truck, but not over a permissible route).

Many other cases, most of them cited in the foregoing opinions, could be added to this list by way of cumulative authority.

## CONCLUSION.

In closing, appellant particularly directs attention to the fact that the claimant McClees, was not only engaged in a personal venture at the time he was injured, but that, far from traveling in obedience to any order or direction of the employer, McClees actually was one day overdue on the return to his place of employment. (R. 69.)

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For the reasons herein set forth it is respectfully submitted that the judgment of the District Court should be reversed and the compensation order and award of compensation in favor of appellee Leland T. McClees annulled.

Dated, San Francisco,
March 29, 1943.

THEODORE HALE,
CARROLL B. CRAWFORD,
*Attorneys for Appellant.*

**(Appendix Follows.)**

# Appendix.

## Appendix

(42 U.S.C.A. 1651-1654.)

[Public Law 208—77th Congress]
[Chapter 357—1st Session]
[S. 1642]

AN ACT

To provide compensation for disability or death resulting from injury to persons employed at military, air, and naval bases acquired by the United States from foreign countries, and on lands occupied or used by the United States for military or naval purposes outside the continental limits of the United States, including Alaska, Guantanamo, and the Philippine Islands, but excluding the Canal Zone, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That except as herein modified, the provisions of the Act entitled "Longshoremen's and Harbor Workers' Compensation Act", approved March 4, 1927 (44 Stat. 1424), as amended, and as the same may be amended hereafter, shall apply in respect to the injury or death of any employee engaged in any employment at any military, air, or naval base acquired after January 1, 1940, by the United States from any foreign government or any lands occupied or used by the United States for military or naval purposes in any Territory or possession outside the continental United States, including Alaska, Guantanamo, and the Philippine Islands, but excluding the Canal Zone, ir-

respective of the place where the injury or death occurs.

SEC. 2. (a) That the minimum limit on weekly compensation for disability, established by Section 6 (b), and the minimum limit on the average weekly wages on which death benefits are to be computed, established by Section 9 (e), of the Longshoremen's and Harbor Workers' Compensation Act, approved March 4, 1927 (44 Stat. 1424), as amended, shall not apply in computing compensation and death benefits under this Act.

(b) Compensation for permanent total or permanent partial disability under Section 8 (c) (21) of the Longshoremen's and Harbor Workers' Compensation Act, or for death under this Act to aliens and nonnationals of the United States not residents of the United States or Canada shall be in the same amount as provided for residents, except that dependents in any foreign country shall be limited to surviving wife and child or children, or if there be no surviving wife or child or children, to surviving father or mother whom the employee has supported, either wholly or in part, for the period of one year immediately prior to the date of the injury, and except that the United States Employees' Compensation Commission may, at its option or upon the application of the insurance carrier shall, commute all future installments of compensation to be paid to such aliens or nonnationals of the United States by paying or causing to be paid to them one-half of the commuted amount of such future installments of compensation as determined by the Commission.

SEC. 3. (a) The United States Employees' Compensation Commission is authorized to extend compensation districts established under the Longshoremen's and Harbor Workers' Compensation Act, approved March 4, 1927 (44 Stat. 1424), or to establish new compensation districts, to include any area to which this Act applies; and to assign to each such district one or more deputy commissioners, as the Commission may deem necessary.

(b) Judicial proceedings provided under Sections 18 and 21 of the Longshoremen's and Harbor Workers' Compensation Act in respect to a compensation order made pursuant to this Act shall be instituted in the United States district court of the judicial district wherein is located the office of the deputy commissioner whose compensation order is involved if his office is located in a judicial district, and if not so located, such judicial proceedings shall be instituted in the judicial district nearest the base at which the injury or death occurs.

SEC. 4. This Act shall not apply in respect to the injury or death of (1) an employee subject to the provisions of the Act entitled "An Act to provide compensation for employees of the United States suffering injuries while in the performance of their duties, and for other purposes", approved September 7, 1916 (39 Stat. 742), as amended; (2) an employee engaged in agriculture, domestic service, or any employment that is casual and not in the usual course of the trade, business, or profession of the employer; and (3) a master or member of a crew of any vessel.

Approved, August 16, 1941.